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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FLUIDIGM CORPORATION, A DELAWARE
CORPORATION; AND FLUIDIGM CANADA
INC., A FOREIGN CORPORATION,

Plaintiffs,

v.

IONPATH, INC., A DELAWARE
CORPORATION,

Defendant.

Case No. 3:19-cv-05639-WHA

**DEFENDANT IONPATH, INC.'S
OPPOSITION TO MOTION FOR
LEAVE TO AMEND THE FIRST
AMENDED COMPLAINT**

1 In January, the Court granted IONpath's motion to dismiss Fluidigm's First Amended
 2 Complaint ("FAC"), dismissing claims for intentional interference with contractual relations, induced
 3 infringement, contributory infringement, and enhanced damages for willfulness. ECF No. 46. The
 4 Court provided Plaintiffs with the chance to file another amended complaint to address the deficiencies
 5 but warned that "it will not necessarily be enough to add sentences parroting each missing item
 6 identified herein." *Id.* at 9–10. Despite the warning, Fluidigm's Second Amended Complaint ("SAC")
 7 remains devoid of the necessary factual allegations to support its claim for intentional interference
 8 with contractual relations and its plea for enhanced damages in view of supposed willfulness. As to
 9 those two claims,¹ the motion for leave to amend should be denied.

10 **I. Fluidigm's Intentional Interference With Contractual Relations Claims Fail To**
 11 **Plausibly Tie IONpath's Actions to Any Breach**

12 The Court dismissed the intentional interference claim in the FAC because "the complaint fails
 13 to allege facts showing patent owners' customers have actually, or will inevitably, misuse plaintiffs'
 14 products (*id.* at ¶ 92)." *Id.* at 4 (emphasis and internal citation omitted). Fluidigm's proposed SAC
 15 remains deficient on this key point.

16 To be sure, Fluidigm now names several alleged IONpath customers and alleges "on
 17 information and belief" that certain named Fluidigm customers "have breached and continue to breach
 18 the Ts&Cs by improperly using Fluidigm antibodies and reagents." (SAC ¶¶ 89–90.) But Fluidigm
 19 does not allege any fact to support its "information and belief" that these customers breached their
 20 agreements with Fluidigm. Instead, Fluidigm's claim rests entirely on the (unpled) inference of breach
 21 stemming from its allegation that IONpath delivered its MIBIScope instruments to these customers
 22 before IONpath had its reagents for sale (SAC ¶ 130), such that the customers would inevitably breach
 23 their agreements by using the IONpath MIBIScope instrument with Fluidigm reagents. In short,
 24 Fluidigm theory boils down to allegation that Fluidigm's customers had to have been using *Fluidigm's*
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26
 27 ¹ Although Fluidigm's allegations of direct and (now limited to post-suit) indirect infringement
 28 fail on their merits for multiple independent reasons, IONpath's opposition focuses on the claims for
 tortious interference and willful infringement, where Fluidigm has not even alleged facts that, if taken
 as true for purposes of this motion, would support those claims at the pleading stage.

1 MAXpar reagents in *IONpath's* MIBIScope instrument, in (alleged) violation of Fluidigm's terms
2 and conditions. (SAC ¶ 129-130.)

3 Even taking these allegations as true (they are not²), Fluidigm's pleading still fails because
4 it requires the Court to make an inference that extends far beyond a plausible inference from the
5 factual allegations in the SAC. Fluidigm's theory rests on the unstated inference (or assumption,
6 really) that any use of the IONpath instrument by these customers would inevitably result in their
7 use of *Fluidigm reagents* (as opposed to IONpath reagents, third-party reagents, or their own home-
8 grown reagents) and thus inevitably result in a breach of contract. But Fluidigm's SAC continues
9 to omit the critical facts that would be necessary to make this inference plausible, even at the
10 pleading stage: that because IONpath sold MIBIScopes before it allegedly had its own reagents for
11 sale, IONpath induced its customers to use Fluidigm reagents with IONpath's instrument *for lack*
12 *of any other choice of reagent*. (SAC ¶ 130; ECF No. 49 at 7.) This fails for two simple reasons.

13 *First*, on the face of the SAC, Fluidigm does not actually allege that there were no other
14 possible reagents for IONpath's customers to use in their MIBIScopes. At ¶ 130 of the SAC,
15 Fluidigm alleges that "IONpath did not offer antibodies and reagents for sale until July 2019, even
16 though IONpath had already sold the MIBIScope product to its customers." Fluidigm further alleges
17 (notably, *not* "on information and belief") that "[p]rior to July 2019, Fluidigm's Maxpar antibodies
18 and reagents were the only such antibodies and reagents *commercially available* and specifically
19 designed to work with these types of mass cytometry systems." *Id.* (emphasis added). What
20 Fluidigm does not—and cannot—allege, is that the lack of a *commercially available* reagent allows
21 one to logically infer that IONpath's customers would have necessarily used Fluidigm's reagents.

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23
24 ² Fluidigm alleges that "IONpath did not offer antibodies and reagents for sale until July
25 2019." (SAC ¶ 130.) In fact, IONpath was supplying reagents to its customers for use with the
26 IONpath instrument well before that date. Fluidigm's allegations as to the customers that have
27 allegedly purchased the IONpath instruments and thus allegedly breached their agreements with
28 Fluidigm are also factually inaccurate—for example, one of the customers is not a customer of
IONpath's instrument at all, while another has not taken possession of any IONpath instrument. Of
course, IONpath understands that the Court must accept factual allegation as true for purposes of
this motion.

1 **Second**, the implication itself—that there were no other alternatives—is negated by
 2 Fluidigm’s own alleged facts. The University of Colorado’s research laboratory lists a “27-marker
 3 panel” of reagents, and the cited webpage³ states that the lab is “happy to discuss *customization*”
 4 and “can help *develop new antibodies* to help you analyze your tissues.” (SAC ¶ 117.) That is to
 5 say, Fluidigm’s own citations demonstrate that research laboratories (including the leading
 6 universities and biomedical research institutions that Fluidigm has accused of breach of contract)
 7 can and do develop their own reagents and antibodies.

8 Ultimately, Fluidigm does not plead—and cannot plead (because it would be false)—that
 9 the mere sale of IONpath instruments to customers would inevitably result in the use of Fluidigm
 10 reagents with IONpath instruments. Without that allegation, there is no factual allegation to support
 11 the plausible inference of inevitable breach by any Fluidigm customer, and the claim must be
 12 dismissed. *See PG&E v. Bear Stearns & Co.*, 791 P.2d 587, 589–90 (Cal. 1990).

13 **II. Fluidigm Does Not Allege Egregious Conduct**

14 **A. The SAC Does Not Allege Egregious Conduct**

15 The Court’s Order granting IONpath’s motion to dismiss requires that Fluidigm allege
 16 “*egregious*” conduct to state a claim for willful infringement. (ECF No. 46 at 9.) The court has
 17 already considered and rejected allegations that were “‘merely consistent with’ liability.” (*Id.*,
 18 quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis omitted).) The marketing of
 19 products, without more, does not give rise to the reasonable inference of egregious conduct. (*Id.* at
 20 9.) Here, while Fluidigm’s SAC identifies *more* marketing materials, it still fails to identify
 21 anything new or raising to the level of egregious conduct:

- 22 ■ The SAC identifies several recent academic publications in 2019 and 2020 (SAC ¶ 105–
- 23 108) and conferences (SAC ¶ 113–118), but the FAC had already identified at least a 2018
- 24 *Cell* publication (FAC ¶ 77–79).

27 ³ Fluidigm’s pleading cites:
 28 <http://www.ucdenver.edu/academics/colleges/medicalschoo/programs/immunology-immunotherapy/HIMSR/HIMSRratesandservices/Pages/Imaging.aspx>

1 ■ The SAC also identifies the commercial launch of MIBIscope (SAC ¶ 112), but the FAC
2 had already cited a “2018 Press Release” that allegedly described pilot implementations
3 of the device (FAC ¶ 74–76).

4 ■ The SAC identifies more customer instructions as to the use of the MIBIscope (SAC ¶
5 159, 195, 231), the FAC had already identified customer instructions related to the use of
6 the device (FAC ¶¶ 114, 141–142, 170).

7 Pleading is not an exercise of quantity over quality. A plea for enhanced damages requires
8 “specific factual allegations about [defendant’s] subjective intent, or any other aspects of
9 [defendant’s] behavior that would suggest its behavior was ‘egregious.’” *Finjan, Inc. v. Cisco Sys.*
10 *Inc.*, No. 17-cv-00072-BLF, 2017 WL 2462423, at *5 (N.D. Cal. June 7, 2017); *see also Halo*
11 *Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1936 (2016) (“‘willful misconduct’ do[es] not
12 mean that a court may award enhanced damages simply because the evidence shows that the
13 infringer knew about the patent and nothing more”) (Breyer, J. concurring) (emphasis omitted).
14 While Fluidigm has added more allegations, none of them rise to the level of egregious conduct. To
15 the contrary, they are merely an extension of the same prior commercial activities identified in the
16 FAC. Fluidigm’s plea for enhanced damages in view of willfulness should be dismissed.

17 In addition, the SAC does not limit its allegations of willfulness to post-suit conduct for all
18 three patents-in-suit. For the ’386 patent, Fluidigm has properly limited its allegation. (SAC ¶ 146.)
19 For the ’104 patent, there is (still⁴) no explicit allegation of willful conduct tied to direct
20 infringement. (SAC ¶ 183.) For the ’698 patent, Fluidigm has not limited the willfulness allegation
21 made at paragraph 218. The Prayer for Relief is likewise not expressly limited in time, but instead
22 states “from the time it became aware of the infringing nature of its product.” (SAC at ¶ G.) This
23 court dismissed these non-time limited allegations of willful conduct, stating: “Should evidence of
24 egregious conduct come to light, **post-filing** for the ’386 and ’698 patents and after September 2018
25 for the ’104 patent, patent owners may move for leave to amend.” (ECF No. 46 at 9 (emphasis
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27
28 ⁴ IONpath’s motion to dismiss identified this shortcoming in the FAC. (ECF No. 34 at 12.)
Fluidigm’s opposition merely pointed to the prayer for relief in its FAC. (ECF No. 37 at 10 n.5.)

1 added).) Fluidigm's pleading fails to fall within the boundaries set by the law of the case, and thus
 2 should be dismissed.

3 **III. Fluidigm Should Not Be Given Yet Another Opportunity To Amend**

4 The Court expressly warned Fluidigm: "If patent owners move for leave to file yet another
 5 amended complaint, they should be sure to plead their best case." (ECF No. 46 at 10.) Presuming
 6 that Fluidigm heeded the Court's instructions, its best case still falls short of making out viable
 7 claims of intentional interference or willful infringement. And at this point, any further amendment
 8 would be futile. It is clear that Fluidigm does not have any evidence of any actual breach of *its own*
 9 *contracts with its own customers*. If it did, it would have pled them. The best that Fluidigm has
 10 come up with on its third shot is the inference that breach was inevitable because IONpath allegedly
 11 did not sell its own reagents until last summer; but that allegation is false, and even if taken as true,
 12 would not be enough to lead to an inference of actual breach by any Fluidigm customer. Likewise,
 13 Fluidigm's third-shot willfulness allegation just loads up the complaint with more of the same
 14 evidence that the Court previously found inadequate to support egregiousness. Fluidigm apparently
 15 does not have any evidence to support an allegation of egregious conduct, and any attempt to amend
 16 at this point would be a waste of time.

17 **IV. Conclusion**

18 In view of the foregoing, Fluidigm's proposed SAC fails to meet the pleadings standards set
 19 forth in this Court's Order granting IONpath's motion to dismiss and in Rule 12 for Fluidigm's
 20 claim for intentional interference with contractual relations and its plea for enhanced damages. The
 21 motion for leave to amend should be denied as to these claims.

22 Dated: February 27, 2020

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